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No. 05-705

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID J. RUSSELL
KELLER ROHRBACK L.L.P.
1201 Third Avenue
Suite 3200
Seattle, WA 98101
(206) 623-1900

AMERICAN FINANCIAL PRINTERS • (202) 464-5600

QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

2. Whether 47 U.S.C. § 276 of the Communications Act of 1934 preempts state law claims for *quantum meruit* and breach of implied contract based on a long distance carrier's alleged failures to compensate a payphone service provider for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Metrophones Telecommunications, Inc. ("Metrophones") makes the following disclosure: Metrophones is privately held. As a result, no publicly held company owns 10% or more of the company's stock.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Metrophones Telecommunications, Inc. ("Metrophones") respectfully submits that this Court should deny the petition for certiorari filed by Global Crossing Telecommunications, Inc. ("Global Crossing") for the reasons outlined below.

OPINIONS BELOW

Petitioner Global Crossing attached the opinions below to its petition. The Ninth Circuit's opinion below was recently published at 423 F.3d 1056. The relevant opinion of the district court is unpublished and is reproduced at App. 14a-33a.

JURISDICTION

Petitioner Global Crossing properly stated the bases for this Court's jurisdiction.

RELEVANT STATUTORY PROVISIONS

Petitioner Global Crossing listed the relevant statutory provisions with the exception of 47 U.S.C. § 414, the savings clause in the Communications Act of 1934.

47 U.S.C. § 414 provides in relevant part: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

STATEMENT OF THE CASE

Metrophones brought this small collections action in March of 2003. In its Complaint, Metrophones sought to

collect only $31,330.42 for uncompensated telephone calls.[1] App. 13a. Global Crossing paid Metrophones for some of the coinless calls placed from Metrophones' payphones, but has refused to pay Metrophones for all coinless calls that were placed from Metrophones' payphones and routed over Global Crossing's network.

In December of 2003, The Honorable Marsha J. Pechman of the United States District Court for the Western District of Washington issued an order permitting Metrophones to amend its complaint to add a cause of action under 47 U.S.C. § 201(b), as well as state law causes of action for *quantum meruit*, implied breach of contract, and negligence. App. 14a-3ea.

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[1] At page 4 of its petition, Global Crossing misstates the facts of the current controversy in two respects. First, Metrophones filed its complaint in March of 2003 and not "[i]n late 2001," as Global Crossing claims. App. 11a. Second, Global Crossing incorrectly claims that Metrophones sought a judgment requiring it to conduct an accounting of amounts owed "since the second quarter of 1999." Petition at p. 4. The truth is that (1) Metrophones did not assert an accounting cause of action in this case; and (2) because of Global Crossing's bankruptcy filing, the unpaid calls at issue in this case begin on January 28, 2002. App. 13a. Indeed, all of the calls at issue in this case were placed during the so-called "toll gate era," when the first facilities-based interexchange carrier (here, Global Crossing) was responsible for all completed calls routed to it by the local exchange carrier. *The Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration,* 16 F.C.C.R. 8,098 (2001) at ¶¶ 1-2.

On the issue of Metrophones' cause of action under 47 U.S.C. § 201(b), Judge Pechman merely held that "[s]ince §§206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201." App. 27a. In reaching her decision, Judge Pechman relied, in large part, on the FCC's *2003 Payphone Order*.[2] In that Order, the FCC specified that a carrier's "failure to pay [dial-around compensation] in accordance with the Commission's pay phone rules...constitutes...an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990, ¶32.

The Ninth Circuit, in affirming Judge Pechman's ruling on the existence of a private right of action under section 201(b), confirmed that this Court's *Chevron* framework applied to the FCC's *2003 Payphone Order*. The Ninth Circuit acknowledged that "the statement in the *2003 Payphone Order* arose in the context of a complex decision about the operation of the whole system of payphone regulation." 423 F.3d at 1066. The Court also noted that it was in the context of "adopting the final rules in the *2003 Payphone Order*, [that] the Commission relied on the availability of actions for damages under §§ 206 and 207." *Id.* In the spirit of this Court's holding in *Brand X*, the Ninth Circuit "defer[red] to the Commission's reasonable, authoritative interpretation of § 201(b) and [held] that a private right of action is available to remedy the unjust and unreasonable practice of failing to pay PSPs according to the Commission's regulations." *Id.* at 1070.

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2 *Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 19,975 (2003) ("*2003 Payphone Order*").

REASONS FOR DENYING THE PETITION

Metrophones believes that this Court should deny Global Crossing's petition for three reasons. First, if there is a conflict between circuit courts, it is a relatively insignificant conflict over the applicability of *Chevron* deference to a statutory analysis performed by the FCC. This Court took up—and resolved—that same issue six months ago in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688 (2005) ("*Brand X*"). Second, there is no qualifying conflict over the preemption issues that the Ninth Circuit decided in the case below. Third, the lawsuit that Metrophones filed against Global Crossing was for the payment of only $31,330.42. Given the relatively small amount in controversy, this Court should not further delay Metrophones' effort to get to the merits of its claim against Global Crossing.

A. The Only Conflict Between Circuit Courts Is Over The Deference Required Under *Chevron*—An Issue That This Court Addressed Earlier This Year.

While it is true that the Circuit Court for the D.C. Circuit recently held—in the case of *APCC Servs., Inc. v. Sprint Communications Co.*, 418 F.3d 1238 (D.C. Cir. 2005) ("*APCC*")—that 47 U.S.C. § 201(b) did not create a private right of action in favor of a payphone service provider, the Ninth Circuit's decision to the contrary does not create a conflict that warrants this Court's intervention. Indeed, if there is a conflict between the *APCC* decision and the decision of the Ninth Circuit below, that conflict came about because the D.C. Circuit issued its opinion in *APCC* only one day after this Court decided the *Brand X* case. Because of that timing (the D.C. Circuit presumably had already

completed its opinion in *APCC* when this Court issued *Brand X*), the D.C. Circuit did not mention *Brand X*—or, for that matter, the FCC's *2003 Payphone Order*[3]—in reaching its decision on the Section 201(b) issue.[4]

In *Brand X*, the FCC had concluded that cable companies selling broadband Internet service were not providing a "telecommunications service[e]" as the Communications Act defines that phrase. This Court—applying the analytical framework outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—held that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute ...." 125 S.Ct. at 2699.

In *Brand X*, this Court determined that *Chevron* deference is appropriate if (1) the relevant statutory language is ambiguous; and (2) the administering agency's statutory

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[3] The majority in the *APCC* case did not even acknowledge the existence of the FCC's *2003 Payphone Order*. Indeed, the D.C. Circuit's determination that the FCC had not spoken on the existence of a private right of action under § 201(b) of the Act is inexplicable, given the *2003 Payphone Order*. As the dissent in *APCC* pointed out, the majority was able to say that "'[t]here was no authoritative interpretation of § 201(b) in this case' only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." 418 F.3d at 1254.

[4] APCC did file a petition for rehearing based, in part, on this Court's decision in the *Brand X* case. That D.C. Circuit, however, denied that petition in November of 2005. *See* 2005 U.S.App. LEXIS 24402.

interpretation is a reasonable one. Given this legal standard, the issue before the Ninth Circuit in the case below became whether 47 U.S.C. § 201(b) unambiguously provides that a failure to pay dial-around compensation does not qualify as a "practice[]" that is "unjust or unreasonable." It does not. Section 201(b) broadly declares unlawful "[a]ll charges, *practices*, classifications, and regulations *for and in connection with ... communication service*" that are "unjust or unreasonable." 47 U.S.C. § 201(b) (emphasis added). The statute does not define the terms "practices" and "unjust or unreasonable." When, as here, the statutory terms at issue are undefined, *Brand X* confirms that the FCC had the discretion to interpret the undefined terms in order to "fill the consequent statutory gap." *Brand X*, 125 S.Ct. at 2708 ("[T]he relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap."). In short, the FCC interpreted ambiguous statutory terms when it issued its *2003 Payphone Order* and specified, after careful consideration,[5] that "[a] failure to pay in accordance with the

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[5] In footnote one of its petition, Global Crossing repeats its mantra that the FCC determination—in the *2003 Payphone Order*—is dicta and, therefore, is not entitled to deference. That argument is unfounded. As the Ninth Circuit correctly explained, the FCC's "statement in the *2003 Payphone Order* arose in the context of the whole system of payphone regulation." 423 F.3d at 1066. In other words, the FCC's "unjust and unreasonable practice" decision was directly related to its broader determination that it should require switch-based resellers—rather than the carrier—to pay PSPs directly for reseller calls placed after July 1, 2004. As the Ninth Circuit explained, "[t]he Commission rejected the PSPs' position in part because the PSPs could recover damages from delinquent carriers in private actions." *Id.*

Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes ... an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990, ¶ 32.

The Ninth Circuit issued its opinion below approximately two months after this Court decided the *Brand X* case. Because of this timing, the Ninth Circuit—unlike the D.C. Circuit in *APCC*—incorporated and applied this Court's teachings from *Brand X*. Thus, the purported conflict upon which Global Crossing's petition is based is not a conflict at all. One circuit appropriately implemented this Court's recent gloss on the *Chevron* framework. The other—because of the timing of its decision—did not.

At its core, Global Crossing's petition is a plea for this Court to revisit the same *Chevron* deference issue that this Court addressed—in *Brand X*—only six months ago. Metrophones respectfully submits that this Court need not revisit the *Chevron/Brand X* issue at this time.

1. The Ninth Circuit's Decision Regarding the Deference Due To The FCC's 2003 Order Was Correct.

Global Crossing's challenge to the merits of the Ninth Circuit's opinion below is based almost entirely upon a suggestion that 47 U.S.C. §§ 206 and 207 permit a PSP to bring a claim for unpaid payphone compensation before the FCC, but not in a federal District Court. Indeed, at page 11 of its petition, Global Crossing argues that this Court should intervene because "the FCC is fully equipped to handle any complaints or disputes administratively." Global Crossing's argument—that PSP's may seek compensation before the FCC but not in federal District Court—is flawed for at least three reasons.

First, Section 207, which provides the statutory basis for complaints for damages for violations of the Act, could not be clearer. It states that complaints can either be brought "to the [FCC]" **or** "in any district court." 47 U.S.C. § 207. Thus, the statute itself confirms that injured parties are free to choose either forum to remedy a violation of the Act. *See Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187, 190 (2nd Cir. 2001) ("there can be no doubt that § 207 permits an injured party to seek relief either in federal court or before the FCC, but not in both"); *Stiles v. GTE Southwest, Inc.*, 128 F.3d 904, 907 (5th Cir. 1997); *Cincinnati Bell Tel. Co. v. Allnet Communications Servs., Inc.*, 17 F.3d 921, 923 (6th Cir. 1994). Given the choice provided by Section 207, there is no principled basis for any distinction that would require injured parties to proceed before the FCC, as Global Crossing maintains Metrophones must, while precluding them from proceeding before a district court.

Second, Global Crossing's logic, if accepted, would deny Metrophones and other payphone owners any forum. The statutory basis for relief before the FCC and a Federal District Court is the same—it flows from Congress' pronouncement (in Section 206) that prohibited acts are actionable. Thus, if Metrophones has no available cause of action *in federal court* under Section 206, then Metrophones would have no cause of action *before the FCC* under Section 206. The economic impact of stripping payphone owners of their right to pursue carriers that underpay would force many payphone owners out of business. Such a result, ironically, would defeat the Congressional intent—expressed in Section 276—to promote the widespread deployment of payphones and competition among payphone service providers by ensuring that they receive fair compensation for every completed call from their payphones.

Finally, Global Crossing's policy arguments are legally irrelevant. The issue before the Ninth Circuit was whether Congress intended to create a private right of action when it enacted Sections 201(b), 206, and 207—not whether that Court, as a matter of public policy, would have made the same decision. There is simply no reason to believe that Congress shared Global Crossing's view that judicial enforcement of payphone compensation requirements would intrude on matters best left to the Commission. In fact, Congress has created private rights of action in federal courts to address other issues that are far more complex than any case concerning payphone compensation. *See, e.g.*, 47 U.S.C. § 252(e)(6) (creating private right of action to seek district court review of state commission decision that interconnection agreements meet the requirements of Sections 251 and 252).

B. The Preemption Issues Decided By The Ninth Circuit Also Do Not Warrant Review.

A writ is certainly not appropriate to review the Ninth Circuit's affirmance of Judge Pechman's ruling permitting Metrophones to assert two state law claims consistent with the FCC's regulations. Review of the Ninth Circuit's decision on Metrophones' state law claims is not necessary or appropriate because the Ninth Circuit's decision on those causes of action does not meet any of the Rule 10 considerations governing review. There is no other federal appellate court that has addressed the viability of state law claims against a long distance carrier for its failure to pay dial-around compensation. State law claims were not at issue at all in the *APCC* case. *See* 418 F.3d at 1242.

The other Rule 10(a) considerations also do not apply to the Ninth Circuit's preemption analysis. The Ninth Circuit merely confirmed that Metrophones' causes of action

for *quantum meruit* and breach of contract were not preempted because only "inconsistent" state requirements are barred by 47 U.S.C. § 276(c). In the words of the Ninth Circuit below, "Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations and, consequently, would not require the district court to determine a reasonable price, let alone to set an 'inconsistent' price." 423 F.3d at 1077.

Finally, it is not true that the Ninth Circuit's preemption analysis is a decision on an important federal question that conflicts with relevant decisions of this Court. The Ninth Circuit's preemption analysis is unique to the case below. The Ninth Circuit correctly focused on the fact that "Plaintiff's quasi-contract claim sought recovery for unjust enrichment in the exact amount that it was entitled to be paid under the federal regulations...." 423 F.3d at 1077. Since only "inconsistent" state requirements are barred by Section 276(c), the Ninth Circuit correctly determined that Metrophones' state law claims were not preempted.

C. Metrophones Only Sought The Payment of Approximately $30,000.

Finally, Metrophones—a small payphone owner—sought the payment of only approximately $30,000. Global Crossing, a self-described "large company"[6] has adopted a strategy of spending tens of thousands of legal dollars to try to avoid a short trial on the simple issue of whether Global Crossing fully compensated Metrophones for calls placed from payphones owned by Metrophones.

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[6] Global Crossing's Petition at p. 17.

Since filing this small collections action in March of 2003, Metrophones has been subjected to (1) Global Crossing's motion to dismiss in the District Court; (2) Global Crossing's protracted interlocutory appeal to the Ninth Circuit; and (3) now, Global Crossing's petition to this Court for a writ of certiorari. Global Crossing's petition should be denied, among other reasons, so that the parties can proceed to a trial on the merits as soon as possible.

CONCLUSION

For the foregoing reasons, this Court should deny Global Crossing's Petition for a Writ of Certiorari.

Respectfully submitted,

DAVID J. RUSSELL
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3200
Seattle, WA 98103
(206) 623-1900
Attorneys for Respondent

December 29, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., a Washington corporation,	)	No. C03-0694P
v.	)	COMPLAINT
GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation and UNIDENTIFIED COMPANIES I THROUGH X,	)	JURY TRIAL DEMANDED

The Plaintiff above named complains of Defendants as follows:

I. INTRODUCTION AND SUMMARY OF COMPLAINT

1. Under 47 U.S.C. § 276(b)(1)(A), 47 C.F.R §§ 64.1300 et seq., and various orders of the Federal Communications Commission ("FCC") in Common Carrier Docket No. 96-128, Defendant Global Crossing Telecommunications, Inc. ("Global Crossing"), as an interexchange carrier of various types of long distance communications, is required to compensate Plaintiff, as a payphone service provider ("PSP"), at the rate prescribed by the FCC, for each and every compensable call including, but not limited to, completed access code calls and toll free calls, that has been made at any time since January 29, 2002 from a payphone owned by Plaintiff and carried over Global Crossing's telephone network facilities. Such compensation is referred to herein as "payphone compensation."

2. Many compensable calls placed from

payphones owned by Plaintiff have been carried over Global Crossing's telephone network, but Global Crossing has failed and refused to provide Plaintiff a full accounting of such calls, and has failed and refused to pay Plaintiff the full amounts of payphone compensation required to be paid under federal law, despite Plaintiff's demands. Plaintiff seeks an accounting of the amounts of payphone compensation owed by Global Crossing for all compensable calls, and judgment for such amounts, plus interest, costs, and attorneys' fees as provided by law.

II. PARTIES

3. Plaintiff Metrophones Telecommunications, Inc. ("Metrophones") is a payphone service provider with its headquarters and principal place of business located in Bellevue, Washington.

4. Plaintiff owns and operates one or more coin-operated and/or coinless payphones for use by the public. As defined by the FCC, Plaintiff is an independent PSP.

5. On information and belief, Defendant Global Crossing is a Michigan corporation with its principal place of business in New York. Unidentified Companies I through X are other subsidiaries and/or affiliates of Global Crossing. Inasmuch as the vast and complex structure of the Global Crossing family of companies makes it difficult to ascertain which particular affiliates are responsible to pay payphone compensation to Plaintiff, as alleged herein, Plaintiff reserves the right to amend its complaint to specifically name such responsible parties, upon ascertainment of the identity thereof. Upon information and belief, all Defendants have acted in concert with respect to the matters alleged herein. As used hereinafter, the term "Global Crossing" refers to the affiliate or affiliates that are responsible for the payment of

payphone compensation to Plaintiff, as alleged herein. Global Crossing regularly conducts business in the state of Washington.

6. Global Crossing is a common carrier as defined in 47 U.S.C. § 153(10). As such, Global Crossing is subject to regulation by the FCC under Title 47 of the United States Code.

7. Global Crossing provides various telecommunications services to the public through its telecommunications network that is accessible from Bellevue, Washington and elsewhere in Washington and the United States. Such services include the carriage over Global Crossing's telecommunications network of various types of calls placed from payphones, such as access code calls (calls made by first accessing Global Crossing's network through dialing a code number) and toll-free calls (calls for which the recipient has previously agreed to pay the toll charges)

III. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. Further, 47 U.S.C. § 207 grants subject matter jurisdiction over this action to this Court.

9. Venue is proper in the United States District Court for the Western District of Washington, under 28 U.S.C. §§ 1391(b) and 1391(c), because Defendant Global Crossing is subject to personal jurisdiction in this district and hence, is deemed to reside in this district.

IV. PAYPHONE COMPENSATION UNDER FEDERAL LAW

10. As a PSP, Plaintiff makes its payphones available to the public to enable persons to make telephone calls. Plaintiff receives compensation for some types of payphone calls through direct payment by the caller (e.g. through the deposit of coins into the payphone) or through commission payments from Plaintiff's presubscribed carrier (the carrier to which operator-assisted calls are automatically routed by agreement between Plaintiff and such carrier). However, a substantial portion of calls placed from Plaintiff's payphones can be and are made without any compensation to Plaintiff from the caller or from Plaintiff's presubscribed carrier. Such calls include access code calls and toll-free calls (all of which shall be referred to hereinafter as "coinless" calls) that are initiated from Plaintiff's payphones and are routed over various carriers' telecommunications networks and facilities, including those of Global Crossing. For coinless calls, the interexchange carrier receives payment through various means, including the use of calling cards, credit cards, debit cards, prepaid cards, and calls billed to another party (e.g., collect, third-party, and toll-free calls).

11. In February, 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). In relevant part, the Act directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all independent payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. § 276(b)(1)(A).

12. Pursuant to the Act, the FCC has promulgated

regulations and has issued orders that require carriers, including Global Crossing, to pay payphone compensation to PSPs, such as Plaintiff, for all completed coinless calls made from a payphone where the caller utilizes a carrier other than the payphone's presubscribed carrier. Such coinless calls include, without limitation, (1) calls that are terminated on Global Crossing's own network; (2) calls that are initially routed by the local exchange carrier to Global Crossing's network; and (3) calls from Global Crossing's network that are routed to other carriers and/or resellers for completion. In particular, the FCC has promulgated the following regulation:

> a. Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

47 CFR § 64.1300(a)

13. Pursuant to the Act, the FCC has issued orders establishing the default per call compensation rate (i.e. the rate that applies in the absence of a contract between the PSP and the carrier) at $.24 per call for all compensable calls made from and after April 21, 1999 rate aff'd sub. Nom. *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

14. Pursuant to the Act, the FCC has promulgated regulations and has issued orders requiring each ~~carrier~~, including Global Crossing, to track or arrange for the tracking of each compensable coinless call carried over its

network including, but not limited to, coinless calls completed by Global Crossing and coinless calls routed to Global Crossing's resellers and other interexchange carriers. In particular, the FCC has promulgated the following regulation:

> (a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by § 64.1300(a). The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

47 C.F.R. § 1310(a)

15. Under FCC-approved procedures adopted by

the telecommunications industry, PSPs, such as Plaintiff, provide to carriers, such as Global Crossing, or to their designated agent(s), on a calendar quarter basis, a list of the telephone numbers of the payphones owned and operated by the PSP as of the end of the applicable calendar quarter. Each such unique telephone number is referred to as an "ANI," which is the acronym for "Automatic Number Identification." The ANI, which may also include payphone specific coding digits identifying as a payphone the telephone from which a call is made, is transmitted with each call made from a payphone, and is recorded and stored by the carrier to whose network the call is routed. The carrier can determine which calls carried over its network were made from which payphones by comparing the ANI lists submitted by a PSP to the carrier's call detail records or other records maintained by the carrier identifying the ANI for each recorded call. By such means, the carrier can also determine to whom payment of payphone compensation should be made, and the amount of such payment.

16. Plaintiff is able to determine, with a high degree of accuracy, the number of compensable coinless calls made from each of its payphones and routed to Global Crossing as the first facilities-based interexchange carrier. Such data are collected by a third party, Bulletins, to whose services Plaintiff subscribes.

17. Pursuant to FCC regulations, carriers are required to remit payment of payphone compensation to PSPs on a quarterly basis.

18. From January 29, 2002 to the date of this Complaint, many compensable coinless calls have been made from the payphones of Plaintiff, which have been routed by the applicable local exchange carrier to Global Crossing as the first facilities-based interexchange carrier.

19. Plaintiff has submitted its ANI lists to Global Crossing or its designated agent for the periods of the first quarter, 2002, to the third quarter, 2002, and will continue to submit their ANI lists to Global Crossing each calendar quarter thereafter.

20. Plaintiff has also submitted demands to Global Crossing for payment of the payphone compensation owed to it, in the form of invoices and other demands for payment.

21. Although Global Crossing has made some partial payments of payphone compensation to Plaintiff, Global Crossing has failed and refused to pay the full amount of payphone compensation owed to Plaintiff for the periods for which Plaintiff has submitted its ANI lists and invoices, in amounts to be proven at trial. Attached hereto as Exhibit A is a chart showing the amount payable by Global Crossing to Plaintiff for the period of the first quarter, 2002, through the third quarter, 2002, together with the amount paid and the balance owing, including interest.

22. Inasmuch as Global Crossing continues to accrue liability to pay payphone compensation to Plaintiff, Plaintiff reserves the right to amend its complaint prior to and/or after trial to allege the amounts owing as of the date of trial.

23. Despite sufficient demand from Plaintiff, Global Crossing's willful refusal to pay the full amount of payphone compensation to Plaintiff or to provide a proper accounting to Plaintiff has continued over many months and years. In the meantime, Global Crossing has reaped substantial profits from the calls placed from Plaintiff's payphones. Furthermore, Global Crossing has collected

millions of dollars in payphone surcharges from its customers, which were imposed for the specific purpose of providing funds from which Global Crossing could make payment to the PSP of the payphone compensation Global Crossing owes to the PSP, including Plaintiff, yet Global Crossing has failed and refused to pay over to Plaintiff the surcharges so collected.

FIRST CAUSE OF ACTION
VIOLATION OF TITLE 47, UNITED STATES CODE, AND REGULATIONS AND ORDERS OF THE FCC

24. Plaintiff realleges ¶¶ 1 through 23.

25. Global Crossing's failure and refusal to pay the full amount of payphone compensation owed to Plaintiff violates Section 276 of the Act and the regulations and/or orders issued by the FCC pursuant thereto.

26. Global Crossing's violations of Section 276 of the Act and the FCC regulations and orders requiring payment to Plaintiff of payphone compensation have caused substantial monetary damage to Plaintiff, in the amounts set forth on Exhibit A attached hereto and incorporated herein, such amounts to be proven at trial, together with such additional amounts as may accrue to the date of trial.

27. Under 47 U.S.C. § 206, Global Crossing is liable to Plaintiff for the full amount of damages sustained by Plaintiff in consequence of Global Crossing's violations of Section 276 of the Act and the FCC regulations and/or orders issued pursuant thereto.

28. The FCC has required that a carrier that fails to pay the full amount of payphone compensation by the required due date must pay interest on the unpaid balance at

the rate of 11.25% per annum. Accordingly, Global Crossing owes Plaintiff pre-judgment interest on the unpaid payphone compensation at the rate of 11.25%, beginning as of the first day of the quarter following the submission by Plaintiff to Global Crossing of an ANI list. Alternatively, Global Crossing owes Plaintiff pre-judgment interest at the maximum rate permitted under applicable state law.

29. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206

SECOND CAUSE OF ACTION
QUANTUM MERUIT

30. Plaintiff realleges ¶¶ 1 through 29.

31. Plaintiff has rendered valuable business services to Global Crossing's benefit.

32. The value of Plaintiff's services rendered to Global Crossing has been set at .24 cents per call originated through Plaintiff's payphones via the "Dial Around" services described above. Accordingly, as of the filing of this Complaint, Plaintiff is entitled to the amounts outlined on Exhibit A attached hereto.

33. Because Global Crossing has not compensated Plaintiff .24 cents per call for all calls routed over its network from plaintiff's payphones, Global Crossing has not only been unjustly enriched in the amounts outlined on Exhibit A, but should be required to pay interest at 11.25% per annum for late payment, pursuant to orders/regulations of the FCC.

34. Global Crossing is liable for Plaintiff's reasonable attorneys' fees pursuant to 47 U.S.C. § 206.

WHEREFORE, Plaintiff prays for judgment against Global Crossing as follows:

1. On the First Cause of Action, for all payphone compensation owed by Global Crossing to Plaintiff under regulations and orders of the FCC, in the amounts set forth on Exhibit A attached hereto, together with such additional amounts as may accrue to the date of the trial, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

2. On the Second Cause of Action, for the amounts set forth on Exhibit A attached hereto, together with prejudgment interest at the maximum rate and for the maximum period allowed by law, reasonable attorneys' fees, costs of court, and such further relief as the Court deems just.

V. DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues that may be tried to a jury.

DATED: March 19, 2003.

KELLER ROHRBACK L.L.P.

/s/
David J. Russell, WSBA #17289
Attorneys for Plaintiff
Metrophones Telecommunications, Inc.

EXHIBIT A

METROPHONES TELECOMMUNICATIONS, INC.
2020 124th Avenue NE, Suite C-103
Bellevue, WA 98005
(425) 869-7551

STATEMENT OF ACCOUNT

As Of 3-31-03

DESCRIPTION (PREVIOUSLY BILLED AND UNPAID DIAL AROUND) BY BULLETINS

Global Crossing Telecommunications, Inc.
180 S. Clinton Avenue
Rochester, NY 14646
(716) 777-8456

Period	Call Count	Rate	Due	Payments
1Q2002 (Jan. 28-Mar 31)	35684	$0.24	$ 8,564.16	$4,455.48
2Q2002	56894	$0.24	$13,654.56	$7,240.44
3Q2002	127664	$0.24	$30,639.36	$6,957.48

Period	Percent	Disputed	Interest	Owed
1Q2002 (Jan. 28-Mar 31)	52.02%	$1,026.48	$260.06	$ 3,342.26
2Q2002	53.03%	$1,596.00	$271.02	$ 5,089.14
3Q2002	22.71%	$1,409.28	$626.42	$22,899.02
			Total Due	**$31,330.42**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. GLOBAL CROSSING TELECOMMUNICATIONS, INC., et al., Defendant(s).	)	No. C03-0694P ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFF'S MOTIONS TO AMEND
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. SOUTHWESTERN BELL COMMUNICATION SERVICES, INC., and WILTEL COMMUNICATIONS, INC., Defendant(s).	)	No. C03-0809P
METROPHONES TELECOMMUNICATIONS, INC., Plaintiff(s), v. VARTEC TELECOM, INC., Defendant(s).	)	No. C03-0811P

This matter comes before the Court on several nearly identical motions in three related cases. Plaintiff Metrophones Telecommunications Services, Inc. ("Metrophones"), a "payphone service provider," has

brought three lawsuits against four long distance phone service carriers, Global Crossing Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc. The cases were originally assigned to three different district judges, but the later two were reassigned to Judge Marsha Pechman on the Court's own motion as related to C03-0694P, as all three cases present substantially similar legal issues. In each of the cases, Metrophones originally asserted a private right of action under Section 276 of the Telecommunications Act of 1996 and the common law cause of action of quantum meruit. The Ninth Circuit then declared that no such private right of action exists, and each of the defendants in these cases moved to dismiss the § 276 claims on this ground, and to dismiss the quantum meruit cause of action as preempted. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Also in each case, plaintiff Metrophones has moved to amend the complaints to include federal causes of action under three other sections of the Telecommunications Act, as well as two other common law causes of action. Defendants oppose the amendments, contending that such amendment would be futile. Having reviewed the papers and pleadings submitted by the parties, the Court hereby GRANTS the defendants' motions to dismiss as to the § 276 claims, but denies those motions as to quantum meruit, as the Court does not view those claims as preempted. In addition, the Court GRANTS the motions to amend, as a private right of action will be allowed under two of the three sections of the Act, and the common law causes of action are not preempted. As these cases involve two controlling questions of law that present novel issues in the Ninth Circuit, the

Court will entertain a proper motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b).

BACKGROUND

Plaintiff Metrophones is a "payphone service provider" that owns and operates public payphones. Metrophones brings these lawsuits against Global Crossing Telecommunications, Inc. ("Global Crossing"), Southwestern Bell Communication Services, Inc. ("Southwestern Bell"), Wiltel Communications, Inc. ("Wiltel"), and Vartec Telecom, Inc. ("Vartec"), which are interexchange (long distance) carriers, for an alleged failure to pay compensation for coinless payphone calls made using Metrophones' payphones.

Payphone service providers ("PSPs") such as plaintiff are compensated for the use of their payphones in two primary ways, either through direct payment by the caller by insertion of coins into the payphone, or "commission payments" from the PSP's "presubscribed carrier," the carrier to which operated-assisted calls are automatically routed. Compl. at 3. Yet calls are also made without utilizing either of these compensation methods, namely credit card (access code) calls and toll-free calls (collectively "coinless" calls). *Id.* For these calls, the caller pays the interexchange (long distance) carrier, but there is no direct means by which the PSP is compensated. *Id.*

In enacting the Telecommunications Act of 1996, Congress restructured and deregulated much of the local telephone industry. Relevant to the present lawsuit, Section 276 of the Act was aimed at promoting competition in the

payphone service industry.[1] That section prohibits "any Bell operating company that provides payphone service" from discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also directs the Federal Communications Commission to promulgate regulations that:

> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

Id. at § 276(b)(I)(A).

To that end, the FCC has promulgated regulations and has issued orders requiring long distance carriers and local carriers to compensate PSPs on a per call basis for calls made using their payphones. 47 C.F.R. § 64.1300 (2003).[2]

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[1] An in depth background of the Act and its history is set forth in *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

[2] The regulations were substantially revised by the Commission's order of October 3, 2003, which switches the obligation to pay from the "first interexchange carrier" to the "completing carrier," and included local exchange carriers in the definition. *In the Matter of The Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct. 3, 2003).

Specifically, the FCC now requires that the "completing carrier" (the interexchange or local carrier that completes a coinless call) must compensate the PSP at a rate agreed upon by the parties. *Id.* at § 64.1300(b). In the absence of such an agreement, the rate is twenty-four cents per call. *Id.* at § 64.1300(d). Further, it is the duty of the completing carrier to track the calls in order to ensure adequate compensation. *Id.* at § 64.1310(a).

After implementation of these regulations, several PSPs (including plaintiff Metrophones) brought an action against Sprint Communications Company for alleged underpayment of per call compensation owed under the regulations. Prior to the defendant even being served, the district court sua sponte dismissed the action on the ground that while § 276 authorized the FCC to promulgate regulations, it did not create an express or implied private right of action based on those regulations. The Ninth Circuit affirmed that decision in the absence of a defendant, holding that § 276 directs the FCC to establish a plan for compensation, but does not create a right to compensation. *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). Although §§ 206 and 207 of the Act create liability for "violations" of the "provisions of this chapter" and a right to sue by persons damaged by such violations, the court reasoned that § 267 did not itself create a duty that one could "violate." *Id.* The court concluded that, unlike some other sections of the Act (i.e. 227(b)(3)(A)), § 267 did not establish a right to sue for violations of its corresponding regulations. *Id.* It appears that plaintiffs in that case did allege a common law quantum meruit cause of action as well, but this was not addressed by the court, and easily

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The Court does not perceive the changes in the regulations to affect the resolution of the issues presented in the motions before it.

could have been dismissed on the basis of lack of subject matter jurisdiction.

Defendants now bring motions to dismiss,[3] arguing that plaintiff's § 267 cause of action has been rendered moot by the *Greene* decision, and that plaintiff's claim for quantum meruit is preempted by the Telecommunications Act, § 276(c). Plaintiff responds by arguing that the Court should hold in abeyance the motions to dismiss as they relate to the § 276 private right of action in order to allow the plaintiffs in *Greene* to file for a writ of certiorari. Plaintiff further argues that the quantum meruit claim is not preempted. Finally, plaintiff moves to amend the complaints to include both new theories of private right of action under the Act, and two other state common law causes of action. Defendants oppose the motions to amend on futility grounds, saying that an end run around *Greene* should not be allowed, and that each of the other state law claims is likewise preempted.

ANALYSIS

A. Private Right of Action Under & 276

Plaintiff argues that despite the clear mandate from the Ninth Circuit that there is no private right of action under § 276 or its regulations, this Court could refuse to "immediately implement the narrow holding of the three-judge panel in *Greene*," and hold the matter in abeyance until after it is determined whether the Supreme Court will

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[3] Defendant Global Crossing has styled its motion as a motion for judgment on the pleadings, but its arguments are identical to those presented in the other two cases.

grant a writ of certiorari on the issue, which plaintiff's counsel in the *Greene* case plans to file soon.

The parties agree that *Greene* is the governing law in the present case, and also recognize that the filing of a petition for certiorari does not change the binding effect of the Ninth Circuit's decision on this Court. While plaintiff argues that the Ninth Circuit made the wrong decision in *Greene*, there is no authority for this Court to simply ignore it. *See Yong v. INS*, 208 F.3d 1116, 1119 n. 2 (9th 18 Cir. 2000); *Wedbush, Noble. Cooke. Inc. v. SEC*, 714 F.2d, 923, 924 (9th Cir. 1983). Yet plaintiff asks the Court to do just that, based on its assertion that "the law in this area is not settled and because the *Greene* decision is still being appealed." Yet the Ninth Circuit has already denied a petition for rehearing en banc. Further, this Court does not presume to know, nor will it hazard a guess, as to what the U.S. Supreme Court will or will not do if presented with a petition for certiorari. What is certain, is that *Greene* is the current controlling law of the Ninth Circuit, and that is the law this Court must follow. The Ninth Circuit has definitively decided the issue, the motion is ripe for decision, and plaintiff's claim for a private right of action under § 276 is dismissed.

B. Preemption of State Law Claims Under § 276(c)

Federal preemption of state law originates from the Supremacy Clause of the Constitution, which invalidates laws that "interfere with or are contrary to federal law." *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298,302 (9th Cir. 1995) (internal quotations omitted). The rule regarding preemption is easy to state, yet tricky to apply – "'[t]he purpose of Congress is the ultimate touchstone' of the

preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504,516 (1992), *quoting Malone v. White Motor Com.*, 435 U.S. 497, 504 (1978). There are three basic situations in which preemption of state law occurs: (1) express preemption, where a federal statute specifically defines its preemptive force; (2) implied, or "field" preemption, where federal regulation of an area of the law is so complete that there is no room for state regulation to occur; and (3) conflict preemption, where compliance with both federal and state requirements would be impossible. *See Hillsborough County, Fla. v. Automated Medical Labs.*, 471 U.S. 707, 712-13 (1985). In addition, a cause of action may be said to "arise under" federal law "if the right to relief under" state law "requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983).

The present cases involve a question of express preemption. In such a case, "the task of statutory construction [of an express preemption clause] must in the first instance focus on the plain wording of the clause, which necessarily entails the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) *quoting CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658,664 (1993). Section 276(c) of the Telecommunications Act of 1996, 47 U.S.C. § 276(c) provides:

> (c) State Preemption
>
> To the extent that any State requirements are inconsistent with the Commission's regulations, the

> Commission's regulations on such matter shall preempt such State requirements.

The preemptive scope of this provision is relatively narrow. Compare *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (recognizing broad preemptive effect of Airline Deregulation Act that preempts state laws "relating to" air carrier rates, etc.) with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemptive force of federal regulations "covering the same subject matter" viewed as narrow). When Congress intends broad preemptive force, it certainly knows how to provide for it.

While the express preemption clause of § 276 has yet to be interpreted by the Ninth Circuit, it is very similar in scope to the one interpreted in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995). There, the court was interpreting federal statutes regulating cable television, which included a provision stating that "no . . . state may regulate the rates for the provision of cable services except to the extent provided under this section and section 532 of this title." *Id.* at 301 and n. 4. The defendant argued that plaintiff's causes of action brought under the state's general unfair business practices act were preempted by the federal cable acts. The Ninth Circuit disagreed, finding that there was nothing inconsistent between the cable acts and the general state statute. *Id.* at 302. The court held that by using the language "regulate the rates," Congress had signaled its intent to limit preemption under the Cable Acts. *Id.*

The language at issue in § 276 is even narrower. In passing the Telecommunications Act of 1996, and in

particular in enacting § 276, Congress provided a very narrow preemptive scope – one that is only invoked when "state requirements are inconsistent with the Commission's regulations." There is nothing inconsistent between the regulations promulgated pursuant to § 276 and the common law doctrine of quantum meruit. In fact, the purpose of each are entirely consistent. The regulations were promulgated in order to "promote competition among payphone service providers and [to] promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). The doctrine of quantum meruit is an equitable one, serving to prevent the unjust enrichment of the defendant in the absence of an enforceable contract by forcing compensation to the plaintiff in an amount equal to the value of the benefit conferred on the defendant. *Eaton v. Engelcke Mfg. Inc.*, 25 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Competition is fostered by a level playing field, one on which there is equity. The purposes of the regulations and the doctrine of quantum meruit are aligned.

This result is also consistent with the statute's "savings clause," which states generally that "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Though it is true that clauses such as these are ineffective if a state law is nevertheless in conflict with a federal statute or regulation, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (doctrine of conflict preemption applies even in face of savings clause), such is not the case here. Nothing in § 276 indicates that Congress intended the regulations to provide the sole remedy regarding collection of monies owed to payphone service

providers. Congress only intended to eliminate inconsistent state requirements.

Finally, plaintiff's quantum meruit cause of action should not be considered to "arise under" federal law as involving a "substantial question of federal law." "The fact that a case may turn in part upon the resolution of some issue of federal law or that federal law constitutes an ingredient of the state law claim for relief does not automatically convert a state claim" into a federal one. *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106, 1117 (N.D. Cal. 2002). In the present case, resolution of the state law cause of action for quantum meruit will not involve a substantial federal question. The FCC regulations in this case establish an obligation to pay on a per call basis and define a rate in the absence of a contract between the parties. Quantum meruit, under Washington law, is a remedy to compensate a plaintiff for the reasonable value of services rendered where retention of that value would be unjust. *Douglas Northwest. Inc. v. Bill O'Brien & Sons 22 Constr. Inc.*, 64 Wn. App. 664, 683, 828 P.2d 565 (1992). Thus the only point at which the state law claim and the federal regulations connect is in establishing the reasonable value of the payphone services provided to the carriers. This does not involve resolution of a substantial federal question.

For each of the above reasons, the Court holds that the plaintiff's state law cause of action for quantum meruit is not preempted.

C. Motion to Amend Complaint

Plaintiff also moves to amend the complaints to include additional federal causes of action under three other

provisions of the FTA and state law causes of action for implied contract and negligence.

Leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Motions to amend are typically granted provided that the amendment will not unduly prejudice the opposing party, is not sought in bad faith, will not cause undue delay, and does not constitute an exercise in futility. *DCD Programs. Ltd.v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Defendants oppose amendment of the complaints in these cases on the ground that the new alleged causes of action would not survive a motion to dismiss under Rule 12(b)(6) and would therefore be futile.

Plaintiff's amended complaints state three new theories of liability and private right of action. Specifically, plaintiff would like to amend in order to state a cause of action under § 201(b) of the Act, which ostensibly requires that all charges, practices, classifications, and regulations be "just and reasonable." Next, plaintiff argues that the regulations and "orders" issued pursuant to the FCC's rulemaking authority should be considered "orders for payment of money" as the term is used in § 407, which allows private parties who were the intended beneficiaries of the order to file suit against a party that has failed to comply with that order. Plaintiff also argues that § 416(c) establishes a duty to comply generally with orders of the Commission. None of these statutory provisions were at issue or addressed by the Ninth Circuit in *Greene*. Finally, plaintiff asks for leave to amend to include two more state common law causes of action for implied contract and negligence.

1. Section 201 (b)

Section 201(b) of the Act provides that

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is *declared to be unlawful.*

47 US.C. § 201(b)(emphasis added). Meanwhile, § 206 states that:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or *declared to be unlawful*, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby. . .

47 U.S.C. § 206 (emphasis added). Finally, § 207 establishes the private right of action:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as

> hereinafter provided for, or may bring suit for the recover of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 US.C. § 207 (emphasis added).

In interpreting the above statutory provisions, the D.C. Circuit has held that a common Carrier's failure to comply with a Commission "rate of return prescription" constituted a "per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates" under § 201. *MCI Telecommunications Co. v. F.C.C.*, 59 F.3d 1407, 1413-14 (D.C. Cir. 1995). This rationale was used to allow a § 201(b) cause of action for violations of the regulations promulgated under § 276 in *APCC Services. Inc. v. Cable & Wireless. Inc.*, 281 F.Supp.16 2d 52, 58 (D.D.C. 2003).

The Court finds this authority persuasive. Although § 276 may not in and of itself provide for a private right of action, § 201 declares unreasonable practices to be unlawful. The Court finds that failure to comply with Commission regulations would per se be an unreasonable practice, and therefore violative of § 201. Since § § 206 and 207 allow a private right of action for acts declared unlawful under the provisions of this chapter, plaintiff may state a cause of action for unreasonable practices under § 201.

The Court is further persuaded by the FCC's recent determination that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201 (b) of the Act." *In the Matter of The Pay Telephone 2 Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Dkt. No. 96-128, 2003 WL 22283556, 30 Communications Reg. (P&F) 609, F.C.C. (Oct 03, 2003). This agency interpretation of the statute is entitled to substantial deference, as the precise issue of whether a violation of the Commission's regulations on PSP compensation would be a violation of § 201 is not specifically addressed by the language of the statute. *Chevron U.S.A.. Inc. v. Natural Resources Defense Council. Inc.*, 467 U.S. 837 (1984). Accordingly, this Court will allow amendment of the 8 complaints to include a cause of action under § 201(b).

2. Section 407

Section 407 of the Telecommunications Act provides that:

> If a carrier does not comply with an *order for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages, and the

> order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the *findings and order of the Commission shall be prima facie evidence of the facts therein stated*, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

47 U.S.C. § 407 (emphasis added). This provision, of course, must be read in the context of the entire statute. As explained above, § 207 allows a person to attempt to recover damages by either filing a complaint with the Commission or filing a suit for damages in district court. The sections that follow establish various procedures, including procedures for filing a complaint before the Commission (Section 208) and for issuance of "orders for payment of money" (Section 209). Section 407 then gives a person the right to bring an action in district court where a carrier does not comply with an "order for the payment of money."

The Court reads the term "order for the payment of money" as a term of art. Section 407 gives an means of enforcement against carriers who do not abide by the Commission's orders for the payment of money. It is clear from §§ 208 and 209 that such orders are made after a petition is filed by a complainant and an investigation is

carried out. The order then directs a specific carrier to pay money "*to the complainant*" (emphasis added) and must give a time period for compliance. Whether or not this is an "order" in the sense of an "adjudication" under the Administrative Procedures Act is unclear. But what is clear is that the Telecommunications Act itself provides a distinct procedure for the issuance of an "order for the payment of money" and its enforcement.

In the present case, plaintiff is not asking this Court to enforce an "order for the payment of money" that was issued by the Commission. Instead, it is asking for a remedy pursuant to rulemaking orders. Those rulemaking orders may address issues of compensation, but they are not "orders for the payment of money" as is contemplated under §§ 209 and 407. Plaintiff's motions to amend are therefore DENIED with regard to the cause of action under § 407.

3. Section 416(c)

Section 416 is entitled "Orders of Commission." Relevant to the present case is § 416(c), which decrees that "[i]t shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with *such orders* so long as the same shall remain in effect."

Unlike the "orders for payment of money" described in the above section, this section refers generally to "orders." There is no indication that this term is to be construed as "adjudications" as set forth in the Administrative Procedures Act. In fact, it appears that where Congress wanted to adopt the APA definition of "orders," it specifically did so. *See* 47 U.S.C. § 409. The Ninth Circuit has expressly held that the APA definition should not be imported into the statute unless

specifically stated. *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir. 1987) (interpreting Section 401 of the Telecommunications Act). Neither does the statute itself provide any guidance as to what an "order" would entail. The Court does not, therefore, read the term to be so narrow. *APCC Services. Inc. v. Cable & Wireless. Inc.*, 281 F.Supp. 2d 52, 58 (D.D.C. 2003). Amendment of the complaints is therefore granted with regard to plaintiffs proposed § 416(c) cause of action.

4. Proposed State Law Claims

Plaintiff also moves to amend the complaints to include other state common law causes of action. For all of the same reasons stated above, the Court finds that plaintiff's state law claims of implied contract and negligence are not preempted by § 276(c) and the Commission's regulations. The amendment as to these claims will be allowed.

D. Interlocutory Appeal

Title 28, Section 1292(b) allows for interlocutory appeals as an exception to the general rule that only "final" orders are appealable. That provision provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a *controlling question of law* as to which there is *substantial ground for difference opinion* and that an immediate appeal from the order may

> *materially advance the ultimate termination of the litigation*, [she] shall so state in writing in such order.

28 U.S.C. § 1292(b) (emphasis added). Either the district court or the court of appeals may stay the case pending resolution of the appeal.

It appears that the present cases involve two issues of novel and controlling law as to which there is a substantial ground for difference of opinion, the first regarding alternative private rights of action under the Telecommunications Act for violations of regulations promulgated under § 276, the other regarding the preemptive scope of § 276(c). Thus, the Court will entertain a properly brought motion pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

The Court holds that plaintiff's claims brought under § 276 of the Telecommunications Act against the various defendants in these cases must be dismissed under the Ninth Circuit's decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003). However, plaintiff's claims for quantum meruit shall stand, as those claims are not preempted by the relatively narrow express preemption provision set forth in § 276(c) of the Act. Next, the Court finds that amendments to the complaints in these cases that assert causes of action under §§ 201(b) and 416(c) shall be allowed, as such amendments would not be futile. A cause of action under § 407, however, shall not be allowed. Finally, plaintiff's supplemental claims for two additional common law causes of action shall be allowed as well as they are not preempted by § 276(c).

The Clerk is directed to send copies of this order to all counsel of record. Dated: December 16, 2003.

/s/
Marsha J. Pechman
United States District Judge